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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-941

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and JOHN A. MURPHY,

Petitioners,

—against—

JOHN F. LOMBARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATUTE CITED

Civil Rights Act

Title 42 § 1983 9

IN THE

Supreme Court of the United States

October Term, 1974

No.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and JOHN A. MURPHY,

Petitioners,

—against—

JOHN F. LOMBARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on July 22, 1974, which reversed an order of the District Court for the Eastern District of New York dismissing respondent's action against petitioners under 42 U.S.C. § 1983.

Opinions Below

The opinion of the Court of Appeals, reported at 502 F. 2d 631, is annexed as Appendix A. The District Court, in dismissing the complaint, did not render an opinion. The order of the Court of Appeals, dated November 4, 1973, denying a petition for rehearing, is annexed as Appendix B.

The order of the Court of Appeals dated December 16, 1974, recalling the mandate and staying the issuance of the mandate for thirty days pending application to the Supreme Court for a writ of certiorari is annexed as Appendix C.

Jurisdiction

The judgment of the Court of Appeals was entered on July 22, 1974. A timely petition for rehearing en banc was denied on November 4, 1974. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

Should the principles of *res judicata* be applicable to actions brought under § 1983 so as to bar the plaintiff from contesting matters which were not litigated but could have been litigated in a prior state judicial proceeding?

Facts

In August 1967, plaintiff was appointed a teacher of common branch subjects in District 23 at Public School 151 in the City of New York (R11).* Plaintiff taught at that school until June 1969, when, after he was examined by two staff physicians and a panel psychologist employed by the New York City Board of Education, he was placed on an involuntary leave of absence until January 31, 1970 R5, 26).

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* References preceded by the letter "A" are to the Appendix annexed to the petition for certiorari. References preceded by the letter "R" are to the Appellant's Appendix in the Court of Appeals.

In September 1969, plaintiff brought an Article 78 proceeding in the New York Supreme Court challenging the authority of the Superintendent of Schools to place him on an involuntary leave of absence. The petition was dismissed with prejudice (New York Supreme Court, Kings County, Index No. 2090/69).

Subsequent to the Article 78 proceeding, plaintiff was again examined by the staff physicians and psychologist (R5). After the examination, it was the consensus evaluation of the psychologist and the two physicians that plaintiff "still suffered from a paranoid state and could not presently function in the classroom" (R5). Accordingly plaintiff's involuntary leave was continued until June 30, 1970 (R5).

During the same period that plaintiff was placed on involuntary medical leave, the Deputy Superintendent was acting upon the recommendation of plaintiff's principal that plaintiff's probationary employment be discontinued (R6). On April 20, 1970, the Board of Education held a hearing pursuant to its by-laws (R6). On June 10, 1970, plaintiff's employment as a probationary teacher was terminated (R28).

In June 1971, plaintiff commenced another Article 78 proceeding in New York Supreme Court to review the termination of his employment on the ground that it was unlawful, arbitrary and unreasonable (Supreme Court, Kings County, Petition and Order to Show Cause, Index No. 9270 1971). The petition sought reinstatement and back pay. The petition alleged, among other things, that the termination of petitioner's employment was improper because it was based on the recommendations of plaintiff's

principal, Mr. Murphy, who "personally disliked petitioner (plaintiff) and was determined to bar him from teaching in the elementary schools of the City of New York. The Supreme Court held that the hearing which was accorded plaintiff was proper and sustained the Board's determination to terminate petitioner's employment (R7). On appeal to the New York Appellate Division, plaintiff again challenged his termination arguing among other points that the hearing violated the Board's by-laws because the plaintiff was not confronted by the witnesses. The Appellate Division affirmed the dismissal of the petition without opinion. 40 AD 2d 1081 (2d Dept., 1973). Thereafter, the Court of Appeals denied leave to appeal. 31 N Y 2d 648 (1973) (Order of Court dated February 15, 1973) (R7).

On March 16, 1973, plaintiff commenced this federal action. (R11, 17). Plaintiff claimed he was entitled to a due process hearing before his termination from employment as a probationary teacher (R16). The complaint alleged that plaintiff's principal had submitted reports, adverse to the plaintiff, to the Board of Education in "bad faith and in retaliation and revenge", as a result of plaintiff's actions (R13, 22). The complaint concluded by asking that plaintiff be reinstated and requested damages (R16-17).

On appeal to the Court of Appeals for the Second Circuit, petitioners argued that since the constitutional claims could have been raised in the state court proceedings, the doctrine of *res judicata* barred the plaintiff from raising the issues in the federal action. The Court of Appeals rejected petitioners' argument and found that the complaint stated a cause of action. In so holding, the Court did not disagree with appellees' contentions that the relief sought in both actions was the same and that the constitutional

issues could have been raised in the Article 78 proceedings in the state courts (A10a, 13a). The decision stated that the principles of *res judicata* would not be applied to bar a procedural due process claim brought pursuant to the Civil Rights Act where such claim had not been actually litigated in the state court proceedings (A11a-12a).*

Reasons For Granting the Writ

The decision below unwisely limits the application of the principles of *res judicata* so as to preclude, in Section 1983 actions, only those matters which were in fact litigated in prior State Court proceedings. In view of the conflict between the circuits on the question involved and in view of the great impact of the decision on the bringing of civil rights actions, the case merits review by this Court.

The decision of the Court below is inconsistent with the decisions of the federal appellate courts in other Judicial Circuits which have held that the principles of *res judicata* apply to § 1983 actions so as to prevent a plaintiff from contesting matters which were litigated or might have been litigated in prior state judicial proceedings. See *Lovely* v. *Laliberte*, 498 F.2d 1261, 1263 (1st Cir., 1974); *Frazier* v. *East Baton Rouge Parish School Board*, 363 F.2d 861, 862

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* The Court of Appeals followed its instant ruling in *Newman* v. *Board of Education of the City School District of New York*, slip opinion, Docket No. 74-1845, January 6, 1975, going as far as to rule that a procedural due process claim had not been raised in the earlier state proceeding even though the petition, in the state proceeding, had alleged "petitioner's forced medical leave of absence has been accomplished in violation of petitioner's due process and equal protection rights, and in disregard of her tenure rights which entitled her to due process hearing on charges as prerequisite to suspension. Education Law, Section 2573." The Court also ruled that since the opinion in the New York court did not mention a due process claim it had not been adjudicated by that Court. *Cf., contra, Grubb* v. *Public Utilities Commission*, 281 U.S. 470 477-478 (1930). It is anticipated that the Board of Education therein will petition for certiorari.

(5th Cir., 1966); *Garner* v. *Louisiana State Board of Education*, 429 F.2d 91 (5th Cir., 1974); *Coogan* v. *Cincinnati Bar Assoc.*, 431 F2d 1209, 1211 (6th Cir., 1970); *Howe* v. *Brouse*, 422 F.2d 347, 348 (8th Cir., 1970); *Johnson* v. *Dept. of Water and Power of the City of Los Angeles*, 450 F.2d 294, 295 (9th Cir., 1971), *cert. den.* 405 U.S. 1072 (1972). See also, *Francisco Enterprises, Inc.* v. *Kirby*, 482 F.2d 481, 485 (9th Cir., 1973), *cert. den.* 415 U.S. 916 (1974); *Shadid* v. *Oklahoma City*, 494 F.2d 1267, 1268 (10th Cir., 1974); *Tang* v. *Appellate Division of New York Supreme Court, First Department*, 487 F.2d 138, 141-142 (2d Cir., 1973), *cert. den.* 416 U.S. 906 (1974); *Thistlethwaite* v. *City of New York*, 497 F.2d 339 (2d Cir., 1974), *cert. den.* Docket #74-524, 43 U.S.L.W. 3355, December 24, 1974.

The decision of the Court in *Lombard* is also inconsistent with this Court's decision in *Angel* v. *Bullington*, 330 U.S. 183 (1946). In *Bullington*, the plaintiff had brought a diversity action for a deficiency arising from the sale of a parcel of Virginia realty upon default on a note secured by a deed of trust. The plaintiff Bullington had previously sued the defendant in North Carolina, where the defendant resided. The North Carolina Supreme Court had upheld a dismissal of the action on the basis of a North Carolina statute which specifically barred recovery of such deficiency judgments. This Court held that the federal action was barred by the state judgment under the doctrine of *res judicata*. In so holding, this Court noted that *res judicata* bars "future litigation between the same parties not only as to all issues actually raised and decided but also as to those which could have been raised." 330 U.S. at p. 186.

Angel v. Bullington, 330 U.S. 183 (1947), has been cited with approval by federal courts which have applied the principles of *res judicata* to § 1983 actions. See *Francisco Enterprises, Inc.* v. *Kirby*, 482 F.2d 481, 485 fn. 5 (9th Cir., 1973), *cert. den.* 415 U.S. 916 (1974); *Brown v. Georgia Power Comp.*, 371 F. Supp. 543, 547-548 (S.D.Ga., 1973), *affd.* 491 F.2d 117 (5th Cir., 1974).

This Court in a recent decision has indicated that the principles of *res judicata* are fully applicable to Section 1983 actions. *Preiser* v. *Rodriquez*, 411 U.S. 475, 497 (1973). In *Preiser*, the Court cited with approval the decision of the Circuit Court, for the Sixth Circuit in *Coogan* v. *Cincinnati Bar Assoc.*, *supra*, 431 F.2d 1209 (1970), and a decision of the Eighth Circuit in *Rhodes* v. *Meyer*, 334 F. 2d 708, 716 (8th Cir., 1964), *cert. den.* 379 U.S. 915 (1964), which held that the principles of *res judicata* prohibit the plaintiff from litigating matters that might have been litigated in the prior state judicial proceeding.

This Court has also held that the Full Faith and Credit Clause of the United States Constitution, together with legislative enactments related thereto, require that state judgments be given the same *res judicata* effect in federal courts, as in state courts, even where federal constitutional questions are involved.* *American Surety Co.* v. *Baldwin*,

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* A recent case comment on *Lombard* in the Harvard Law Review suggests that the Full Faith and Credit Clause, together with 28 U.S.C. § 1738, should be held to bar a plaintiff, like Lombard, a voluntary litigant in a prior state action, from commencing a federal action based on a claim that could have been raised in the state proceeding. Note, 88 Harvard Law Rev. 453, 456, 463 (1974).

In this case comment the author notes that pursuant to 28 U.S.C. § 1738, federal courts are required to give state judgments the "same full faith and credit" they would be given in the state of rendition. The author concludes that insufficient "countervailing" federal policies are involved in a case such as the case at bar to warrant ignoring this statutory mandate. *Id.* at pp. 455-457. As the author notes, the decision below nowhere mentions § 1738. *Id.* at pp. 455-456.

287 U.S. 156, 165-166 (1932). See also, *Gart* v. *Cole*, 263 F.2d 244, 247-248 (2d Cir., 1958), *cert. den.*, 359 U.S. 978 (1959). See also, 28 U.S.C. § 1738. Consistent with this principle, it has been held that a federal court does not even have jurisdiction to review federal constitutional questions which have been voluntarily submitted to and decided by the state courts. *Brown* v. *Chastain*, 416 F.2d 1012 (5th Cir., 1969), *cert. den.* 397 U.S. 951 (1970). See also, *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923).

The decision of the Court below, contravenes strong policy considerations which support the application of the principles of *res judicata* to matters that were not litigated but could have been litigated in the state courts. One of the major purposes of the doctrine of *res judicata* is to prevent harassment and inconvenience to litigants. If the decision in *Lombard* is sustained, this purpose will be largely frustrated. Every disaffected government employee who believes his constitutional rights have been violated will have the opportunity to bring multiple court actions. Initially, he will bring a state court proceeding deliberately limiting his claims to those arising under state law. Then, if his state court proceeding, including appeals, is unsuccessful, he will be able to commence a proceeding in federal court seeking the same relief based on the very same facts that were litigated in the state court proceeding. This is what occurred in the present case. The result is an undue burden on the governmental defendant and the federal courts.

Another major purpose of the doctrine of *res judicata* is to promote respect for judicial proceedings and judgments rendered therein. Litigation should come to a certain end within a reasonable time. Respect for the integrity of state courts depends on their decisions being authoritative, and

the authority of state courts, and respect for law are weakened if they become merely a stopping off place on the way to final decision.

The Court below stated that the policy reason for restricting the application of the doctrine of *res judicata* is that "if the appellant inadvertently or through his lawyer's mistake failed to raise the constitutional claim, it is small comfort to tell him that he should look to the Supreme Court for redress" (Opinion, Appendix A at p. 12a). On analysis, the illogic of this reasoning is apparent. Moreover, on such analysis, the grave consequences of accepting such reasoning are also apparent. Lawyers' inadvertence or oversight should never be a reason for ignoring a state court civil judgment. In *Lovely* v. *Laliberte*, 498 F. 2d 1261 (1st Cir. 1974), the court, in an action brought under the Civil Rights Act, Title 42 § 1983, rejected the plaintiff's argument that the doctrine of *res judicata* should not be applied because the plaintiff's attorney was derelict in failing to present the constitutional defense in the state court proceeding. The Court stated, 498 F.2d at p. 1264:

> "But the principle behind res judicata, the prevention of duplicative litigation, has the same force regardless of the ultimate reason for the second suit. An attorney's action in litigation binds the client and his client's later doubts concerning the course pursued by his attorney are not a good justification for subjecting the opposing party to continuous litigation."

If the Court of Appeals' reasoning in the case at bar is accepted, by a parity of reasoning, no prior civil judgment, state or federal should ever be treated as final and accorded *res judicata* effect as long as the plaintiff in a subsequent proceeding could make out a claim, however colorable, of

lawyer's inadvertence. Indeed, if this theory is accepted, this Court's final judgments and orders should be subject to reopening merely on the ground that the parties wish to advance a new theory of law or to argue a new analysis of the facts which their counsel "inadvertently" omitted to argue in the prior proceedings. If this is to be the rule, there will be little left to the concept of a final judgment.

We recognize the plaintiff's right to bring a civil rights action in the first instance where a substantial constitutional question is presented. We do not believe, however, that the principles of *res judicata* should be so limited as to permit a plaintiff to litigate the same cause of action, against the same individual, based on the same facts, merely by changing legal theories and courts.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

January 13, 1975.

Respectfully submitted,

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APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 208—September Term, 1973.

(Argued December 5, 1973 Decided July 22, 1974.)

Docket No. 73-2057

JOHN F. LOMBARD,

Plaintiff-Appellant.

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, and JOHN A. MURPHY,

Defendants-Appellees.

Before:

WATERMAN and FEINBERG, *Circuit Judges*, and GURFEIN, *District Judge.**

Plaintiff-appellant brought a 42 U.S.C. §1983 action against defendants-appellees alleging unconstitutional violations of his civil rights. He moved for a temporary injunction. Defendants moved to dismiss the action upon the ground that it was barred by res judicata and to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted. The United States

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* Of the United States District Court for the Southern District of New York, sitting by designation.

District Court for the Eastern District of New York, Travia, *J.*, denied the motion for a temporary injunction and granted the motion to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted.

Judgment below reversed and remanded.

MORRIS WEISSBERG, New York, N.Y., *for Appellant.*

LEONARD KOERNER, New York, N.Y. (Norman Redlich, Corporation Counsel, New York City; Stanley Buchsbaum, on the brief), *for Appellees.*

GURFEIN, *District Judge*:

Plaintiff-appellant John F. Lombard appeals from an order of the United States District Court for the Eastern District of New York, Anthony J. Travia, J., dismissing his complaint against the New York City Board of Education and one John A. Murphy for failure to state a claim upon which relief can be granted and denying as moot his application that pending final disposition of his claims he be granted a preliminary injunction reinstating him as a teacher in the public schools. For permanent relief Lombard seeks from the Board of Education reinstatement as a teacher and an award of all back pay due him. In addition, Lombard seeks money damages from Murphy, the principal of the school where appellant taught, alleging that the principal, by filing false reports with the Board of Education and by also requesting and coercing parents and students to write false reports, had initiated the administrative process which led to and resulted in the discontinu-

ance of Lombard's probationary appointment. This suit is brought under 42 U.S.C. §1983[1] with jurisdiction predicated on 28 U.S.C. §1343(3), (4). There was no opinion below.

Appellant Lombard raises several constitutional claims on this appeal. He contends that he was denied his first amendment rights,[2] and his fourteenth amendment rights to due process under the United States Constitution when his employment as a probationary teacher was terminated by the New York City Board of Education without his first having received written reasons supporting that termination and an evidentiary hearing thereon. He also argues that he was denied his fourteenth amendment rights when the Board of Education disqualified him from teaching with his substitute license without first providing him with written reasons for the disqualification and without granting him an evidentiary hearing.

Appellees Board of Education and Murphy here, as they did in the court below, maintain that res judicata bars all of Lombard's constitutional claims on the grounds that he had a full opportunity to raise all the issues presented to the federal court in state proceedings he had brought to

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1. 42 U.S.C. §1983 reads as follows:

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. Although appellant alleges that his first amendment rights have been violated, he offered no factual support in his affidavit in the district court. In view of our disposition we leave the issue without comment.

challenge the termination of the probationary appointment. The Board also argues that the appellant was not denied due process as he did not make out a claim that he had been deprived of any fourteenth amendment rights.[3]

On November 1, 1966, the plaintiff-appellant was assigned as a regular substitute teacher in the New York City public school system to teach at Public School 151 in Queens, New York. He taught as a regular substitute teacher for one year and received a satisfactory rating from his principal, John A. Murphy. On August 11, 1967, the appellant was granted a regular license for a probationary period of three years, effective September 6, 1967. The appellant received credit for one-half year of substitute teaching and therefore his probationary period expired and his permanent appointment became due on March 8, 1970. For his first year of teaching as a regular licensed teacher in Public School 151, Lombard received a satisfactory rating from his principal.

During his second year as a regular teacher, the 1968-1969 academic year, the principal at Public School 151, John A. Murphy, submitted a report to the Board of Education on March 28, 1969, recommending that the appellant's probationary appointment be discontinued and that

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3. As noted, Judge Travia, without writing an opinion, dismissed the action on the ground that the complaint failed to state a claim upon which relief can be granted. Theoretically, under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the inquiry antecedent to this type of dismissal would be restricted to searching the face of the complaint. In his order of dismissal, however, Judge Travia noted that he had relied upon affidavits filed by the plaintiff and the defendants, affidavits which we find contain matters outside the pleadings. In effect, therefore, the judge was required to, and presumably did, dispose of the motion before him as if it were one seeking summary judgment.

he be directed to submit to a medical examination to determine his fitness to teach. In this report and in a subsequent letter of May 5, 1969, the principal enumerated the alleged factual bases for his recommendation that Lombard's probationary appointment be discontinued and that Lombard be required to undergo a medical examination.

Murphy indicated that the teacher had committed acts and had made statements showing prejudice against black pupils, that Lombard had engaged in bizarre acts such as kicking students, that he had used obscene language, that he had violated several rules of the school, including failure to punch the time clock properly, and that he had frequently complained that the heat in his classroom was insufficient.

Lombard's complaint, on the other hand, challenges the principal's motivation for recommending the medical examination and the discontinuance of the appellant's probationary appointment and further denies the substance of the charges made by Murphy. Lombard, describing the aforementioned charges made against him by Murphy as "false," alleges that those charges were made "[i]n bad faith and in retaliation and revenge for" certain acts performed by Lombard.

These acts which Lombard claims provoked Murphy to pursue a vendetta against him include complaints by Lombard to Murphy about insufficient heat in the classroom, Lombard's filing of grievances in response to the principal's refusal to allow appellant to examine his own personnel file and the principal's wrongful withholding of appellant's check from him for nine days, Murphy's refusal of the appellant's request that the Chapter Chairman of the

United Federation of Teachers in his school be allowed to accompany the appellant to a conference with an assistant principal, and the appellant's submission of written reports which described incidents of disorderly conduct and obscene language used by black pupils.

In May of 1969, the appellant was examined by two staff physicians of the Board of Education and in June of 1969 by a psychologist. The appellant was found to be suffering from an "emotional upset that is of recent origin and is of a paranoid nature." Pursuant to these findings and without a hearing, the appellant was given an involuntary leave of absence until January 31, 1970.

In September of 1969, the appellant commenced a proceeding under Article 78 of the New York Civil Practice Law and Rules in the New York State Supreme Court, Kings County, challenging the authority of the Superintendent of Schools to place him on an involuntary leave of absence, and seeking to be reinstated as a teacher. The petition was dismissed on January 16, 1970 by Justice Feiden.

In January and March of 1970, the appellant was called for further examination by physicians and psychologists to determine his fitness to return to duty. The panel recommended that the leave of absence be extended until June 30, 1970.

On the other hand, while on medical leave of absence the appellant applied to the United States Department of Health, Education and Welfare for a disability allowance. HEW gave the appellant a special examination and received a report from a member of the Board of Education's medical panel. On April 7, 1970, HEW, stating that Lombard was not unable to work at his normal occupation, denied his claim for a disability allowance.

Appendix A—Opinion of Court of Appeals

On April 20, 1970, pursuant to section 105a of the By-Laws of the Board of Education, a hearing was held before a Committee of the Superintendent of Schools concerning the appellant's probationary status. At this hearing appellant presented written statements in his support, and several witnesses gave unsworn oral testimony on his behalf. There was no testimony relative to appellant's unfitness to teach, and the principal did not testify. The Committee had before it the reports by the principal and the recommendations of the physicians and psychologists who had examined the appellant. The Committee recommended that the probationary appointment be discontinued on the following five grounds:

(1) Illogical and disoriented conversation, causing request for examination by the Medical Department, which found him unfit for duty.

(2) Weakness in discipline and class control.

(3) Incompetent and ineffective instructional performance.

(4) Inattention to routine matters such as keeping records of pupil attendance, admission or discharges. Poor relations with Supervisors and Teachers.

(5) Violation of the By-Laws on Corporal Punishment.[4]

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4. A District Superintendant, on June 23, 1969, disapproved Mr. Murphy's charge that the plaintiff had hit certain students because investigation "indicates that there is sufficient reliable evidence to prove that in fact these acts took place."

And we note that Mr. Murphy's charge that appellant had committed acts showing prejudice against black pupils was not found to be a ground for the recommendation.

After Superintendent of Schools Irving Anker had approved the report, the applicable school board, Local School Board No. 23, adopted it on June 11, 1970, to become effective September 10, 1970.

Following his dismissal as a probationary teacher, Lombard sought work with his substitute teacher's license in a number of New York public schools. However, inasmuch as the Board of Education in its Special Circulars #66 for 1971-1972 and #89 for 1972-1973 directed school principals not to hire the appellant as a substitute teacher, he was unable to obtain continuous employment, and, indeed, several schools were forced to dismiss Lombard because of the Board's circular.

In June of 1971, Lombard commenced a second Article 78 proceeding in Supreme Court, Kings County, to review the termination of his probationary appointment and to seek reinstatement as a teacher. Justice Cowin denied the petition on June 27, 1972. The Appellate Division affirmed without opinion, 40 App. Div. 2d 1081, 337 N.Y.S. 2d 1003 (2d Dep't 1972), and on February 15, 1973 the Court of Appeals denied leave to appeal, 31 N.Y.2d 648.

In March of 1973, Lombard commenced this action in the Eastern District of New York.

The appellees contend that this suit is barred by the doctrine of res judicata because the appellant had a full opportunity in his Article 78 proceedings in the state courts to raise all of the issues relating to termination of his services as a probationary teacher. In the first proceeding, in Supreme Court, Kings County, Lombard contended that the Board of Education had failed to comply with a provision of its own by-laws and that its direction to him that

he apply for leave of absence without pay was invalid for he still had unexhausted sick leave with pay he was entitled to exhaust. This petition was denied, and the act of the Board was upheld.

In the second, and more important, proceeding, commenced in June of 1971 in Supreme Court, Kings County, the appellant challenged the validity of the order terminating his service as a probationary teacher. He alleged that the Board of Education had acted illegally in terminating his probationary appointment three months after his probationary term of service had expired. Lombard further alleged that the Board of Education's action in terminating his probationary appointment on the ground that he was an unsatisfactory teacher "was illegal, arbitrary and capricious and without foundation and must have been primarily based on the fact that Petitioner's former principal, Mr. John A. Murphy, personally disliked petitioner and was determined to bar him from teaching in the Elementary Schools of the City of New York." It was thus Lombard's position in this state court proceeding, as it is here, that the charges made by Murphy and the unsatisfactory rating issued by him caused the termination of Lombard's probationary appointment and that those charges and that rating were unjustified and without foundation.

In denying the petition, Justice Cowin stated:

> The primary thrust of petitioner's argument is that he acquired tenure by acquiescence. He (petitioner) argues that since his probationary appointment ended in March of 1970 and respondents did not vote to terminate his services until June 1970, he acquired tenure by operation of law.

Disagreeing with this argument Justice Cowin found that the appellant had not completed his required probationary service at the time his appointment was terminated, and then discussed Lombard's contention that he was entitled to back pay. Finally, at the very end of his opinion, Justice Cowin declared:

> The court is also of the opinion that the hearing accorded petitioner was proper and that the determination made to terminate his services was not arbitrary or capricious.

Lombard did not specifically raise the fourteenth amendment constitutional issue in either of these two Article 78 proceedings, but the appellees argue that, nevertheless, the appellant should have raised them in those state proceedings, and that his failure to do so precludes him from raising them in this section 1983 action.

I

Whether it is called res judicata or claim preclusion, as Judge Waterman so convincingly demonstrated in *Divine* v. *CIR*, the tests of claim preclusion are not to be applied mechanically but are "intended only to apply to certain classes of issues which for policy reasons it has been decided should generally be litigable only once." Slip op. 4293, 4305 (2d Cir. June 20, 1974). For several reasons, we think that policy considerations should not permit the extension of the res judicata doctrine in this case to issues of procedural due process which are said to raise claims under 42 U.S.C. §1983.

First, when the Civil Rights Act was authoritatively interpreted in *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961), the Supreme Court said:

> The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.

To apply res judicata to a remedy which "need not be first sought and refused" in the state court, and which actually was not sought would be to overrule the essence of *Monroe* v. *Pape* and *Lane* v. *Wilson*, 307 U.S. 268, 274 (1939).

Second, if a federal action under section 1983 is considered to be the *same* cause of action as to the state action for purposes of claim preclusion then a plaintiff desiring to raise a state statutory construction issue or even a state constitutional issue would, and probably should, not be able to raise these points in the federal district court in the first instance. See *Reid* v. *Board of Educ.*, 453 F.2d 238 (2d Cir. 1971); *Coleman* v. *Ginsberg*, 428 F.2d 767 (2d Cir. 1970). Here, even if we would like to put all the issues in the same court, we are better off not to *compel* the plaintiff to seek constitutional redress in the state court or statutory construction in the federal court. See *McNeese* v. *Board of Educ.*, 373 U.S. 668 (1963). That is what we think choice of forum means in Civil Rights Act cases.

Third, while the per curiam opinion in *Frazier* v. *East Baton Rouge School Board*, 363 F.2d 861 (5th Cir. 1966), contains language that appears to support the application of res judicata in a section 1983 action to a failure to raise the constitutional claims in the state courts, it raises various policy problems if applied to the case at bar. The court in *Frazier* said that "the judgment is conclusive as to all

matter which were litigated or *might have been litigated* in the first action." 363 F.2d at 862. The court added that "the only appropriate federal forum for review of his alleged federal claims of discrimination was the United States Supreme Court." Id. But if the appellant inadvertently or through his lawyer's mistake failed to raise the constitutional claim, it is small comfort to tell him that he should look to the Supreme Court for redress. It seems clear enough that if the appellant actually failed to assert his constitutional claim in the state court he could not get a writ of certiorari from the nonconstitutional judgment of the state court. 28 U.S.C. § 1257(3); Sup. Ct. Rule 19; *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969); *Ellis* v. *Dixon*, 349 U.S. 458 (1955); *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 162 (1932) ("failure to make seasonably the federal claim"). We prefer to treat the statement in *Frazier* as *obiter* so far as a *procedural* due process claim is concerned, since in *Frazier* there had been a "full hearing" in the state court and procedural due process was not involved.

So, too, other opinions which in language support an extension of the res judicata rule did not involve a claim of deprivation of procedural due process, see *Johnson* v. *Department of Water and Power*, 450 F.2d 294 (9th Cir. 1971), or the appellant had failed to object to evidence. *Coogan* v. *Cincinnati Bar Ass'n*, 431 F.2d 1209 (6th Cir. 1970). *Howe* v. *Brouse*, 422 F.2d 347 (8th Cir. 1970), was a case where the defendant judge had already been held by the state court to have judicial immunity.

We think that the problem, strictly speaking, is not a res judicata problem. We think it is rather a question of

whether the appellant has "waived" his constitutional rights. It is not quite fair to say that he "waived" his right to assert in the administrative agency itself that the process afforded was not "due process." For such an attack in the administrative agency itself on the ground of unconstitutionality would be futile. *Cf. McNeese* v. *Board of Educ.*, supra, 373 U.S. at 675. See also Judge Friendly's explanation of *Damico* v. *California*, 389 U.S. 416 (1967), in *Eisen* v. *Eastman*, 421 F.2d 560, 569 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970); Friendly, Federal Jurisdiction: A General View 100 & n.111. Nor is the plaintiff required to make the attack in an Article 78 proceeding in the state court, for section 1983 gives him an independent supplementary cause of action, and he may choose the federal court as the preferred forum for the assertion of constitutional claims of violation of due process. *McNeese* v. *Board of Educ.*, supra. Indeed, if waiver is treated as a modality of exhaustion of remedy, the exhaustion, similarly, need not be of the state judicial remedy, but only of the administrative remedy. See *James* v. *Board of Educ.*, 461 F.2d 566 (2d Cir. 1972).

Of course, where a constitutional issue is actually raised in the state court, as it can be in an Article 78 proceeding by treating it as an action for a declaratory judgment, *Matter of Kovarsky* v. *Housing & Development Administration*, 31 N.Y.2d 184 (1972), the litigant has made his choice and may not have two bites at the cherry. See *Thistlethwaite* v. *City of New York*, slip op. 3441 (2d Cir. May 13, 1974). Nor need we consider here the situation of a constitutional claim where no independent supplementary cause of action like an action under Civil Rights Act is

involved, and where the constitutional claim could have been adjudicated just as well by the state court. See *American Surety Co.* v. *Baldwin*, supra, 278 U.S. at 164-67. For the foregoing reasons policy prevents the application of res judicata (claim preclusion) in this case.

If we treat the problem as a more limited one of collateral estoppel (issue preclusion), policy still prevents its application for the reasons given. In addition, for the doctrine of issue preclusion to be applicable, the determination of the issue must have been *necessary* to the decision. Restatement (Second) of Judgments § 68 (Tent. Draft No. 1, 1973); *Halpern* v. *Schwartz*, 426 F.2d 102 (2d Cir. 1970). There may have been a number of reasons why Lombard was dismissed without a determination on the merits of the issue whether Murphy's charges were based upon bias or even reprisal. The failure to put Murphy on his oath and to permit Lombard to cross-examine him tends to support the conclusion that a finding on Murphy's bias was not necessary to the decision that Lombard was mentally unfit.

Finally, the policy conclusions may be stated in summary form. First, it is not consistent with *Monroe* v. *Pape*, supra, to put appellant in a position where he cannot raise the constitutional question on an application for a writ of certiorari either to the state court *or* to the federal court, i.e., to *any* court. Second, it is not consistent with constitutional due process to permit to stand a "finding" that appellant is, in effect, mentally uncompetent or inadequate without giving him an opportunity in *any* tribunal to confront his accusers in an evidentiary type of hearing.

II

Turning to the merits, we hold that appellant's case comes within the exception stated in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). Though Lombard did not have tenure and, therefore, presumptively had no property right either as a probationary or substitute teacher, *Canty* v. *Board of Educ.*, 470 F.2d 1111 (2d Cir. 1972), cert. denied, 412 U.S. 907 (1973), he was deprived of his reputation as a person who was presumably free from mental disorder. Without being given the right to confront witnesses, the termination of his probationary employment was recommended by the Committee of the Superintendent on the primary ground: "I. Illogical and disoriented conversation, causing request for examination by the Medical Department, which found him unfit for duty."

This is not only a finding but a stigma. If it is unsupportable in fact it does grievous harm to appellant's chances for further employment, as indeed the record demonstrates, and not only in the teaching field. For that reason he was entitled to a full hearing.

The distinction taken by the Court in *Roth* is that where the appellant's "good name, reputation, honor, or integrity is at stake" or "the State, in declining to re-employ [the respondent], imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities," 408 U.S. at 573, he may claim a deprivation of "liberty" under the due process clause of the fourteenth amendment. A charge of mental illness, purportedly supported by a finding of an administrative body, is a heavy burden for a young person to carry through

life. A serious constitutional question arises if he has had no opportunity to meet the charge by confrontation in an adversary proceeding. Cf. *Birnbaum* v. *Trussell*, 371 F.2d 672 (2d Cir. 1966) (accusation of racial bias). Unfortunately, the district court did not write an opinion revealing the precise basis of its decision. But we construe the judge's ruling as resting on a determination—which we have held to be incorrect—that Lombard had no protected interest entitling him to due process. We conclude, therefore, that he should be given a trial in the district court to determine whether appellees have violated his federal constitutional rights. Cf. *Arnett* v. *Kennedy*, 42 U.S.L.W. 4513, 4520, 4531 (U.S. April 16, 1974) (noting right to plenary post-termination hearing). Summary judgment was inappropriate. Cf. *Leonard* v. *Sugarman*, 466 F.2d 1366, 1367 (2d Cir. 1972) (plaintiff did not "seriously contest" charges of misconduct). In reversing the judgment we remand for further consideration of Lombard's motion for a preliminary injunction in conformity with this opinion.

Judgment reversed and remanded.

APPENDIX B

Order Denying Petition for Rehearing En Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourth day of November, one thousand nine hundred and seventy-four.

Docket No. 73-2057

JOHN F. LOMBARD,

Plaintiff-Appellant,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, and JOHN A. MURPHY,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees, a poll of the judges in regular active service having been taken and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby it denied.

/s/ IRVING R. KAUFMAN
IRVING R. KAUFMAN
Chief Judge

APPENDIX C

Order Recalling Mandate Pending Petition for Certiorari

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 16th day of December, one thousand nine hundred and seventy-four.

JOHN F. LOMBARD,

Plaintiff-Appellant,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and JOHN A. MURPHY,

Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the appellees by notice of motion dated November 25, 1974 to recall the mandate and to stay its reissuance for thirty days pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is granted subject to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

It is further ordered that

/s/ STERRY R. WATERMAN
STERRY R. WATERMAN
/s/ WILFRED FEINBERG
WILFRED FEINBERG
/s/ MURRAY I. GURFEIN
MURRAY I. GURFEIN
Circuit Judges